PETITION FOR A WRIT OF CERTIORARI

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OTHER AUTHORITIES CITED.

Frankfurter, Distribution of Judicial Power between the United States and State Courts, 13 Cornell L. Q. 499 (1928) 25

Kennedy, Federal Income Taxation of Estates and Trusts (1948), p. 97, fn 4 28

Paul, Studies in Federal Taxation, 3rd Series (1940), pp. 125-126 16

Restatement, Trust §214 28

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No.

FREDERICK E. ANDERSON,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

FREDERICK E. ANDERSON,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The Petitioner prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit, entered in the above-entitled cases.*

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* By order of the court below, the two cases, involving identical issues but different tax years, were consolidated for record, briefing, hearing and opinion in that court, as they had been in the Tax Court.

Opinions Below.

The findings of fact and memorandum opinion of The Tax Court (R., 7-8) are not officially reported (see 9 T. C. M. 325). The opinion of the court below (R., 335) is reported in 185 F. (2d) 1021.

Jurisdiction.

The judgments of the Court of Appeals were entered on January 24, 1951 (R. 337-340). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254.

Questions Presented.

Whether the F. E. Anderson Oil Company, a co-partnership of petitioner and his wife validly formed on September 14, 1940 in accordance with the laws of the State of Connecticut (and *still* doing business as such) was "a partnership for income tax purposes" for the tax years here involved (1942-1945) under Sections 181, 182, 183 and 3797(a)(2) of the *Internal Revenue Code.*

Whether this Court, in *Commissioner* v. *Culbertson,* 337 U. S. 733,* "reiterated" the tests of vital services and independent capital supposedly laid down by *Commissioner* v. *Tower,* 327 U. S. 280 and *Lusthaus* v. *Commissioner,* 327 U. S. 293.

Whether there is any warrant in law for the rule applied by a minority of the Courts of Appeal and a minority

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* The *Culbertson* case was decided by the Fifth Circuit on *June 20, 1948,* prior to the effective date of the amendment to *Internal Revenue Code Section 1141(a), infra,* p. 1a. Hence, this Court's review was necessarily of limited scope under the doctrine of *Dobson* v. *Commissioner,* 320 U. S. 489. See *National Labor Relations Board* v. *Pittsburgh Steamship Co.,* Feb. 26, 1951, No. 42 and discussion *infra,* p. 26.

of the Tax Court that a partnership which is not a sham may nevertheless be held to be "invalid for income tax purposes."

Whether the provisions of Section 1141(a) of the *Internal Revenue Code* as amended were correctly applied in this case.

Whether the finding, affirmed by the Court below, that the petitioner can be taxed on the income derived from property owned by another, is contrary to the decisions of this Court (*Commissioner* v. *Willcox,* 327 U. S. 404; *Poe* v. *Seaborn,* 282 U. S. 101; *Erie R. R.* v. *Tompkins,* 304 U. S. 64).

Statutes Involved.

Section *1141 (a)* of the *Internal Revenue Code,* as amended by *Public Law 773,* approved June 25, 1948, effective September 1, 1948, giving the Courts of Appeal the same jurisdiction to review decisions of the Tax Court of the United States as they have over District Court cases tried without a jury, is reprinted *infra,* page 1a.

Section *3797(a)(2)* of the *Internal Revenue Code,* defining a "partnership" is reprinted, *infra,* page 2a.

Sections *181, 182(c)* and *183(a)* of the *Internal Revenue Code,* determining the taxability of partnership income, are reprinted, *infra,* page 1a.

Section *1112* of the *Internal Revenue Code,* dealing with the burden of proof in fraud cases, is reprinted *infra,* page 2a.

Section *1118* of the *Internal Revenue Code,* dealing with the review of decisions by the full Tax Court, is reprinted *infra,* page 2a.

Section *7307* of the *General Statutes of Connecticut* (Revision of 1949), which abolished dower after April 20, 1877, is reprinted *infra,* page 4a.

Section *7308* of the *General Statutes of Connecticut,* providing for the wife's reimbursement of support furnished to the husband, so far as material, is reprinted *infra,* page 4a.

Section *504* of *Revenue Act of 1942,* changing the name of the Board of Tax Appeals, is reprinted *infra,* page 3a.

Sections 2, 3, 4, 9 and 12 of the *Administrative Procedure Act** are reprinted *infra,* pages 4a-8a.

Judicial Code (28 U. S. C.) Section *1444,* foreclosure action against United States, is reprinted *infra,* page 8a.

Judicial Code (28 U. S. C.) Section *2410,* actions affecting property on which United States has lien, is reprinted *infra,* pages 8a-10a.

Statement.

Facts.

The facts in this case are entirely undisputed, being based upon testimony of the petitioner, his wife, three

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* The question whether any administrative agency was impliedly excluded from the broad sweep of the *Administrative Procedure Act* has been laid to rest by this Court in *Sung* v. *McGrath,* 339 U. S. 33. However, in prior briefs to this court, respondent has intimated that the position of the Justice Department is that the Tax Court is a court of record and not an administrative agency. While petitioner will rely principally upon the expanded scope of review provided by the amendment to *Section 1141(a) Internal Revenue Code, supra,* the provisions of the *Administrative Procedure Act* are included in view of this Court's recent opinions in *Universal Camera Co.* v. *National Labor Relations Board,* No. 40, and *National Labor Relations Board* v. *Pittsburgh Steamship Co.,* No. 42, both decided February 26, 1951. That the Tax Court is an administrative agency subject to the Administrative Procedure Act, see: *Lincoln Electric Co.* v. *Commissioner* (6th Cir., 1947), 162 F. 2d 379, revg. 6 T. C. 37.

prominent bank executives who are wholly disinterested, and by documentary evidence.

The sole issue is the validity "for income tax purposes" of the F. E. Anderson Oil Company, a parnership between petitioner and his wife (R., 12).

The enterprise is engaged in the business of blending and selling lubricating oils, cutting oils and other allied products (R., 338-340). The business was started in 1935 (R., 345-347), with a $100 contribution from the joint account of husband and wife (R., 167). The business was originally financed partially on a factoring basis and partially by funds borrowed by petitioner and his wife (R., 174, 347-350). From the outset, the record discloses that the business could not have continued without borrowed capital and the capital could not be borrowed unless the wife endorsed the notes (R., 100, 113, 115, 178-182, 202, 316). Three bank executives so testified (R., 96-115, 116-131, 132-150).

On September 17, 1940, on the advice of the attorneys who represent him here, petitioner executed an absolute conveyance (Exh. 31, R., 352) of an undivided interest in the assets and good will of the F. E. Anderson Oil Company, title to which was vested by State law in petitioner individually (R., 202-203). Articles of copartnership were thereupon executed and acknowledged (Exh. 1, R., 338-340). In accordance with Connecticut law, a Certificate of Registration of Trade Name was filed in the Town Clerk's office (Exh. 2, R., 342-344). The parties held themselves out to their bankers as partners (R., 96-115, 116-131, 132-150). The parties held themselves out as partners to the agents of respondent and the local Collector (R., 353). As late as March 7, 1946, respondent had examined and approved

all partnership returns (Exh. 36, R., 354), with full knowledge of the partnership's history (R., 353).

The wife, both before and after the formalization of the partnership, furnished credit (R., 96-115, 116-131, 132-150). From 1935 to September 14, 1940, F. E. Anderson Oil Company borrowed at least $6,700 on the signature of the petitioner and at least $1,900 on the signature of petitioner and his wife. From September 14, 1940 to December 31, 1945, the F. E. Anderson Oil Company borrowed at least $354,125, all *in the name of the partnership* (R., 9-11).* Being partnership loans, the bankers relied on the liability of Mrs. Anderson on such loans. They so testified (R., 96-115, 116-131, 132-150). Under Connecticut law, her signature as a partner was not required in order to bind her on such credit (*infra*, p. 24), a fact relied upon by bankers (R. 104). Thus, the wife's credit was extended on all partnership borrowings. Both before and after the partnership, the wife's separately owned property was a vital factor in securing the loans which were the life-blood of the enterprise (R., 100, 113, 115, 123, 174, 182, 213, 316).

The petitioner could not have conducted the enterprise without the credit supplied by the wife's pledge of her separate property. It would have been a valid joint venture without a partnership agreement; under formal articles of co-partnership, the enterprise satisfied every known test of a true partnership under state law or general commercial law (R., 314-329).

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* The findings of the Tax Court (R. 11) are adroitly worded: "$344,125.82 of that amount was borrowed *by the company* [i. e., by the *partnership*] on petitioner's *own* signature." (Italics ours.) With attention to emphasis, the finding is deceptively true. The notes were executed:

F. E. Anderson Oil Co. by F. E. Anderson } or { F. E. Anderson Oil Co. F. E. Anderson, Partner

Opinion of the Tax Court.

This case was tried (December 13-16, 1948) and the briefs submitted (May 16, 1949) prior to, but decided after, the decision of this Court in *Commissioner* v. *Culbertson, supra,* (June 27, 1949). [See Docket Entries, R., 2, 5.] As the record will show, the trial judge was also the trial judge in the *Culbertson* case (R., 78).

Although the Tax Court professes to follow the mandate of this Court, it is obvious that its decision is affected by *"the momentum of its prior decisions"**.

Selecting one paragraph from this Court's opinion, the Tax Court said (R., 12-13):

> "Much has been written on the subject of family partnerships but since the opinion in *Commissioner* v. *Culbertson,* 337 U. S. 733, we know that the question is: * * * whether, considering all the facts—the agreements, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent—the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise. * * *"

The opinion omits from its Culbertson quotation this vital clause immediately preceding the above:

> "The question is *not* whether the services or capital contributed by a partner are of sufficient importance to meet *some objective standard supposedly established by the Tower case,* but whether, consid-

* *National Labor Relations Board* v. *Pittsburgh Steamship Co., infra.*

ering all the facts" etc. [337 U. S. at 742]. (Italics ours.)

The above is repeated by this Court [337 U. S. at 744]:

> "It [the Tax Court] assumes there is no room for an honest difference of opinion as to whether the services or capital furnished by the alleged partner are of sufficient importance to justify his inclusion in the partnership."

Although the Tax Court professed to follow the directions of this Court in the single paragraph quoted in its opinion, it ignored these vital elements stressed by this Court:

"The testimony of disinterested witnesses": three bank executives whose disinterested testimony established a bona fide partnership held out to the public (including the tax collector) as such (R. 96-115, 116-131, 132-150, 204);

"Their respective abilities": the husband was unable to secure loans without the independent support furnished by the wife's separate property (R. 100, 119, 140);

"The actual control of income": The wife's distributive share was deposited to her own bank account and subject to her sole dominion and control (R., 292, 317).

In short: it was "an Honest-to-God" partnership *(Culbertson, supra).*

Motion for Review by the full Tax Court.

Petitioner's motions for review by the full Court (see R., 15-22), pursuant to *Internal Revenue Code, Section 1118, infra,* page 2a, were denied *April 21, 1950* (R., 3, 5) although *five months earlier the presiding judge expressed irreconcilably contrary views:*

In the motion for review (R., 15, 22) petitioner cited the case of *Leon Haber*, T. C. Memo, Docket 18679, November 9, 1949 (8 T. C. M. 996). There Judge Kern said (at pp. 997-998):

> "[Husband and wife] are operating as partners in the full sense of the term. That petitioner may have given his wife whatever interest she had on or about the time of the creation of the partnership in January, 1944, need not, of itself, vitiate the partnership. (See *Edward A. Theurkauf*, 13 T. C. [529] (October 7, 1949)."

Petitioner contends that the failure of the presiding judge to grant petitioner's motion for review was an abuse of administrative discretion as a matter of law.

Opinion of the Second Circuit.

The Second Circuit disposed of this case in a single sentence:

> "Decisions affirmed on the authority of *Morrison* v. *Commissioner*, 2nd Cir., 177 F. 2nd 351." [R., 335, 185 F. (2d) 1021.]

The *Morrison* case involved the "income tax validity" of a husband-wife partnership where the *wife supplied capital and rendered services* and *the respondent allocated to her a reduced portion of the partnership income.* In effect conceding that, even if there was no partnership, at least there was a joint venture but presuming to reallocate the income contrary to the agreement of the parties. This is contrary to this Court's ruling:

> "The *Tower* case did not purport to authorize the Tax Court to substitute its judgment for that

of the parties." [*Culbertson, supra,* 337 U. S. at 745.]

More extended comment on the Second Circuit's approach to these problems is again reserved for "Reasons for Granting the Writ", *infra.*

Specifications of Errors to Be Urged.

The Court of Appeals erred:

1. In deciding that the petitioner was liable for deficiencies in income taxes for the years 1943, 1944 and 1945 in the respective amounts of $38,311.55, $46,736.62 and $27,600.44.

2. In finding that the petitioner and his wife did not, "during the taxable years", intend in good faith to carry on business as a partnership.

3. In taxing to petitioner the income derived from the income-producing property of another taxpayer, to wit: petitioner's wife.

4. In taxing to petitioner the income vested, by the law of Connecticut and by the Internal Revenue Code, in another taxpayer, to wit: petitioner's wife.

5. In failing to find from the uncontradicted testimony of disinterested witnesses that petitioner's wife had contributed vital capital to the partnership by pledging her separate property for the payment of partnership debts.

6. In failing to follow Connecticut law and general commercial law as the applicable rules for determining the reality of a partnership under the Internal Revenue Code.

7. In failing to find that the denial of petitioner's motion for review by the full Tax Court pursuant to Section 1118

of the *Internal Revenue Code* was an abuse of administrative discretion as a matter of law.

8. In failing to give effect to the expanded scope of review of decisions of the Tax Court by the amendment to Section 1141(a) of the *Internal Revenue Code* made by *Public Law 773,* act of June 25, 1948, effective September 1, 1948.

9. In failing to find that respondent's charge that the partnership was a sham was tantamount to a charge of fraud and the clear and convincing evidence rule should apply.

10. In affirming the Tax Court.

REASONS FOR GRANTING THE WRIT.

1. In all family partnership cases (and other cases involving intra-family transfers of income-producing property) the respondent continues to argue that this Court, in *Commissioner* v. *Culbertson,* merely "reiterated" the tests of vital services and original capital, citing *Commissioner* v. *Tower,* 327 U. S. 280 and *Lusthaus* v. *Commissioner,* 327 U. S. 293. Only the First and Second Circuits have succumbed to this patently fallacious argument; all other Circuits and an overwhelming majority of the judges of the Tax Court have emphatically rejected respondent's contentions. The end result is a situation that is more than mere conflict among the Circuits; it is a geographical discrimination in the administration of the law which is far removed from "Equal Justice under the Law."*

* Since this Court has never sanctioned a geographical discrimination, it seems unnecessary to plead that such discrimination would be contrary to the express provisions of Article I, Sec. 8, Clause 1, of the Constitution: "but all Duties, Imposts and Excises shall be uniform throughout the United States". The discrimination here set forth would conflict with accepted Constitutional principles. See: *Knowlton* v. *Moore,* 178 U. S. 96; *Head Money Cases,* 112 U. S. 596.

2. The decisions of the Second Circuit are now in irreconcilable conflict with the decisions in all other circuits, with the possible exception of the First.† The overwhelming weight of authority in the Courts of Appeals, by repeated reversals of the Tax Court, show the fundamentally erroneous approach by an adamant minority of the Tax Court.

Respondent's petition for certiorari in the *Culbertson* case (October Term 1948, No. 313, p. 7) stressed the then "alarming tendency" of the Courts of Appeals to reverse the Tax Court's decisions invalidating family partnerships. That the tendency has grown to include *all* Circuits, except the First and Second, is shown by the following tabulation:

Third Circuit:	*Ardolina* v. *Commissioner,* (January 2, 1951) 186 F. (2d) 176, revg. 8 T. C. M. 1111.
Fourth Circuit:	•*Funai* v. *Commissioner,* (May 19, 1950) 181 F. (2d) 890, revg. 13 T. C. 696.
Fifth Circuit:	*Lee Johns* v. *Commissioner,* (March 2, 1950) 180 F. (2d) 469, revg. 7 T. C. M. 711.
Sixth Circuit:	*Sam H. Miller* v. *Commissioner,* (June 2, 1950) 183 F. (2d) 246, revg. 8 T. C. M. 26.

† In *Barrett* v. *Commissioner,* decided by the First Circuit on November 13, 1950, 185 F. 2d 150, the concurring opinion strongly indicates doubt as to the correctness of the legal approach by the Tax Court. It is apparent that that Court was swayed, as the Second Circuit continues to be, by respondent's theory that *Commissioner* v. *Culbertson, supra,* "reiterated" the so-called tests supposedly laid down by *Commissioner* v. *Tower,* 327 U. S. 280, and *Lusthaus* v. *Commissioner,* 327 U. S. 293.

• A later decision of the Fourth Circuit: *Collamer* v. *Commissioner,* (November 8, 1950) 185 F. (2d) 146, affg. 9 T. C. 367, is perhaps distinguishable. If not, then intra-circuit conflict exists.

Seventh Circuit:	*George L. Johnston* v. *Commissioner,* (February 14, 1950) 180 F. (2d) 355, revg. 8 T. C. M. 198.
Eighth Circuit:	*Hartz* v. *Commissioner,* (October 27, 1948) 170 F. (2d) 313, revg. 6 T. C. M. 465, cert. den. (June 27, 1949) 337 U. S. 959.
Ninth Circuit:	*Twin Oaks* v. *Commissioner,* (July 20, 1950) 183 F. (2d) 385, revg. 8 T. C. M. 280.
Tenth Circuit:	*H. A. Eckhard* v. *Commissioner,* (May 15, 1950) 182 F. (2d) 547, revg. 12 T. C. 384.
District of Columbia:	*Jerry Maiatico* v. *Commissioner,* (June 19, 1950) 183 F. (2d) 836, revg. 12 T. C. 146.

3. The above list covers only recent reversals of the Tax Court. The cases originating in the district courts show even greater conflict with the views of the Second Circuit. In *Ginsberg* v. *Arnold, Coll.* (Fifth Circuit, December 21, 1950), 185 F. (2d) 913, with one dissent, in reversing the district court (88 F. Supp. 903), the Court said (p. 916):

> "The finding by the trial court to the effect that this was a valid partnership between appellants and their children and others who might collaterally attack it, but not for tax purposes, cannot be sustained. As Mr. Justice Frankfurter said in his concurring opinion in the *Culbertson* case, there is no 'special concept of "partnerships" for tax purposes differing from the concept that rules in ordinary commercial law cases.' A family partnership for income tax purposes is to be judged in the light of partnerships in general."

The change in approach, which the Fifth Circuit considered as required by this Court's opinion in the *Culbertson* case, is emphasized by the *contrary result reached in a prior review of the same case,* with one dissent, see 176 F. (2nd) 879*, remanded on rehearing, 176 F. (2d) 884. The same Court's later decision in *Arnold, Coll.,* v. *Green* (January 10, 1951), 186 F. (2d) 18, affirming 87 F. Supp. 255, said:

> "The partnership, though made with minors, was valid under Texas law (citing cases). So valid, it was valid, against the claim of the Commissioner, unless it was entered into not in good faith but as a sham or pretense." (One Judge dissented.)

4. The Second Circuit considers that these family partnership cases should turn on the "validity of a transfer of income-producing property for income tax purposes" and the doctrine is not restricted to family partnership cases. Thus, in *Bentley* v. *Commissioner,* 184 F. (2d) 668 (certiorari denied March 6, 1951, No. 516) the Second Circuit refused to give effect to an absolute conveyance of property from husband to wife. As the petition in No. 516 stated (p. 10), the Fifth Circuit, in a factual situation identical with *Bentley,* had no trouble in reversing the Tax Court (*Henson* v. *Commissioner,* 174 F. (2d) 846). Two other Circuits have reached the same result as the Fifth on similar factual situations: the Third Circuit, in *Helen C. Brown* v. *Commissioner* (February 28, 1950), 180 F. (2d) 926, reversed the Tax Court (12 T. C. 1095) and upheld the validity of an absolute conveyance; it approved and followed an

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* Opinion by Judge Lee dated August 16, 1949, one judge dissenting. Remanded September 13, 1949, following the death of Judge Lee prior to entry of judgment, a circumstance that prevented the Court from considering the effect of the amendment to *Internal Revenue Code, Section 1141(a),* which had become effective September 1, 1949 (*infra,* p. 1a).

earlier Seventh Circuit case, *Skemp* v. *Commissioner* (1948), 168 F. (2d) 598, reversing 8 T. C. 415.

Possibly as a result of the Third Circuit's reversal in *Brown, supra,* the Tax Court approves a sale and contemporaneous lease-back where tax consequences were admittedly the motivating factor: *May Department Stores,* 16 T. C.-No. 67 (involving a Pittsburgh, Pennsylvania taxpayer). Yet this same type of transaction is considered reprehensible in the Second Circuit:

> "That this [*Gregory* v. *Helvering,* 293 U. S. 465] makes motive a test of taxability is true enough; but it is equally true that it makes it so only when the reduction of taxes is the sole motive." *Slifka* v. *Commissioner* (May 22, 1950), 182 F. (2d) 345.

The Second Circuit is expanding the *Gregory* rule in a manner not in accord with the decisions of this Court, where the *Gregory* rule has always been considered to condemn only "the wholly useless temporary compliance with statutory literalness" (*John B. Kelley Co.* v. *Commissioner* (1946), 326 U. S. 521). Prior decisions of the Second Circuit had so construed the rule; in *Chisholm* v. *Commissioner* (1935), 79 F. (2d) 14, cert. den. 296 U. S. 641, the Court said:

> "In *Gregory* v. *Helvering* [293 U. S. 465] • • • the incorporators adopted the usual form for creating business corporations; but their intent, or purpose, was merely to draught the papers, in fact not to create corporations as the court understood that word. That was the purpose which defeated their exemption, not the accompanying purpose to escape taxation; that purpose was legally neutral. *Had they really meant to conduct a business by means of the two reorganized companies, they would have escaped whatever other aim they might have had, whether to*

> *avoid taxes, or to regenerate the world.*" [Italics added.]

The abrupt change of approach from *Chisholm* to *Slifka*, as illustrated by the foregoing quotations, should be reviewed by this Court before the confusion becomes any greater.

> "Few cases have been the subject of such violent disagreement and confusion as the *Gregory* case. The case is all things to all men." *Paul, Studies in Federal Taxation,* 3rd Series (1940) pp. 125-6.

Certiorari should be granted to determine whether the rules applied in this case by the Second Circuit are affected by the "momentum of its own prior decisions" (*National Labor Relations Board* v. *Pittsburgh Steamship Co.*, No. 42, February 26, 1951. Cf. *Universal Camera Corp.* v. *National Labor Relations Board,* No. 40, February 26, 1951).

5. The vicissitudes of an absolute conveyance of property, when subjected to the respondent's attack as to its "income tax validity" is best illustrated by the case of *Pelham G. Wodehouse,* 8 T. C. 637. An absolute assignment of literary property was held invalid for both of two tax periods before the Tax Court. Because tax returns were filed in the New York Collector's office in one year and in the Baltimore Collector's office in the other, the Tax Court's decision was reviewed successively by the Second and Fourth Circuits. The Second Circuit *reversed* (177 F. (2d) 881, 1949, one Judge dissenting) and held the assignment valid; the Fourth Circuit *affirmed* (178 F. (2d) 987) and held the assignment "invalid for income tax purposes".

The extent of the intra-circuit conflict in the Second Circuit is further illustrated by its prior decision in *Humphreys* v. *Commissioner,* (1937) 88 F. (2d) 430, reversing 33 B. T. A. 1081. The court upheld the validity of a family partnership, saying (p. 432):

> "We do not regard *Gregory* v. *Helvering,* 293 U. S. 465, * * * as justifying a disregard of the partnership relations. * * * In the present case, however, the partnership was *formed and continued for years.* Through the *risk of capital and personal credit* Mrs. Humphreys and Mrs. Day for many years received business profits, as members of the firm, upon which they are plainly subject to taxation." (Italics ours.)

The *Humphreys* case, apparently, has been overruled *sub silentio.*

The Second Circuit's decisions in *Wodehouse* and *Humphreys, supra,* are in square conflict with this *Anderson* case and with the *Bentley* case, *supra.*

6. The conflict in the Tax Court on family partnerships and related questions, as it existed prior to *Culbertson,* is best described by Judge Black of that Court, who, during the trial of the *Edward A. Theurkauf* case, 13 T. C. 529 (tried March 31, 1948, S. M. pp. 10-11) said:

> "I happen to be one of what was a majority of the Tax Court who held at one time that if the husband made a bona fide complete gift of a partnership interest to his wife, that that constituted her capital and was a valid partnership, and the *Scherer** case in which I wrote the opinion, is a notable case, and the majority of the Tax Court thought it was correct, but at one time a majority would be for

* 3 T. C. 776 (acq.).

> one view† and at another time a majority would be for another view, and the matter got into great confusion and reached the Supreme Court and now it is perfectly clear that in the light of what the Supreme Court decided the *Scherer* case could no longer be authority even though you concede there was a valid gift from the husband to the wife because there evidently was one in the *Tower* case and there evidently was one in the *Lusthaus* case, but the Supreme Court held that where the capital originated with the husband and he continued to be the dominant factor in the business, and the wife rendered no important and essential service to the business there was no valid partnership as far as tax law is concerned, although I held and believed to the contrary until the Supreme Court so decided. Now, I have to accept the Supreme Court whether I agree with its reasoning or not."

The *Theurkauf* case (decided October 7, 1949, shortly after this Court's *Culbertson* decision) is still the leading Tax Court decision of the *post-Culbertson* era. Notwithstanding respondent's claim that the case was on all fours with the *Tower* case (see 13 T. C. 529, at 533) Judge Black, writing for the majority, said (at page 533):

> "In our opinion the substance of the Supreme Court's decision in the *Tower* case was that the test in determining the bona fide character of a family partnership is to ascertain whether the partners really and truly intended to join together for the purpose of carrying on a business and sharing its profits, or whether the partnership was a mere sham,

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† As an example of the pre-*Tower* and *Lusthaus* era, see *E. R. Ledbetter,* B. T. A. Memo., Docket No. 104852, 1942 Prentice Hall B. T. A. Memo. Decisions ¶42,039, where a gift was held to be a valid contribution to the partnership contemporaneously formed; the wife never having previously participated in the enterprise as she did in the *Anderson* cases.

utilized for the purpose of reducing a taxpayer's true tax liability by a pretended distribution of income. Such, in our view, is the interpretation given to the *Tower* case in the recent decision of the Supreme Court in *Commissioner* v. *Culbertson*, 337 U. S. 733. In the *Culbertson* case the Supreme Court said:

> 'The Tax Court's isolation of "original capital" as an essential of membership in a family partnership also indicates an erroneous reading of the *Tower* opinion. We did not say that the donee of an intra-family gift could never become a partner through investment of the capital in the family partnership, any more than we said that all family trusts are invalid for tax purposes in *Helvering* v. *Clifford, supra.* The facts may indicate, on the contrary, that the amount thus contributed and the income therefrom should be considered the property of the donee for tax, as well as general law, purposes. * * *'
>
> "In the instant case we think the facts do show that the amount of capital which Frances contributed to the partnership and her agreed percentage of the partnership profits should be considered her property for tax as well as other purposes. We have so found."

The trial judge in the case now before this Court wrote the dissent in *Theurkauf* (13 T. C. 536-539) in which *five other judges** concurred. The dissent adhered to the view that *Tower* and *Lusthaus* applied (at 538-9).

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* The subsequent conversion of some of the *Theurkauf* dissenters presents interesting contrasts. *Ralph K. Gee*, T. C. Memo, Docket No. 21804, decided *November 24, 1950* (9 T. C. M. 1092), held a partnership with wives valid, although there was no written agreement, no books showing capital accounts, yet the *necessary intent* was found; the same judge on *March 15, 1950*, nine months after *Culbertson*, cites that opinion and invalidates a partnership for

Later history shows continued defections in the ranks of the *Theurkauf* dissenters, induced by the repeated reversals in Court of Appeals (*supra*, pp. 12-13).

In *Willis H. Vance* (June 15, 1950) 14 T. C. 1168, a majority upheld the validity of a family partnership. The dissent (now reduced to two), after referring to the numerous prior Tax Court decisions that were contrary and indistinguishable, said:

> "The suggestion is that because this proceeding will be reviewed by a Circuit† which has several times reversed the Tax Court on cases in this field, the present result is justified. I hope we are not creating a principle which will be applied by the Tax Court with varying results depending on the Circuit to which the case will go on appeal." [14 T. C. at .....]

The *Vance* case and its companion, *William S. Bein*, 14 T. C. 1144, are factually identical but *contrary* to the *Bentley, Brown* and *Skemp* cases, *supra*.

Yet the respondent, while asserting here the correctness of the *Bentley* result, has acquiesced in *Vance* and *Bein;* see *1950 Internal Revenue Bulletin*, No. 19, page 1.

In later Tax Court cases the majority abandoned the "income tax validity" concept for the "necessary intent" concept dictated by this Court's *Culbertson* opinion. In *Estate of George L. Hannaman*, 15 T. C. No. 47, acqui-

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absence of "original capital" and "vital services": *John H. Cary*, T. C. Memo, Docket No. 15980, 9 T. C. M. 197. Conversion was indicated in *Emmy Rienacker*, T. C. Memo, Docket 20763, 10 T. C. M. 6, January *8*, 1951, where a partnership was upheld because the *"necessary intent"* was found; yet only four days later a more favorable factual situation was held *"invalid for tax purposes"*, *L. W. Seabrook*, T. C. Memo, Docket 9927, January *12*, 1951, 10 T. C. M. 53.

† Ohio taxpayer, review would have been taken to the sixth Circuit.

esced: *1951 Internal Revenue Bulletin,* No. 3, page 1, the Tax Court unanimously upheld the validity of a partnership where the wives, *who only pledged their credit,* drew equal amounts with their husbands, *who performed all the required services.* The Court said:

> "Respondent places great emphasis upon the testimony of Harriett Hannaman to the effect that she signed the partnership agreement on her husband's recommendation in order 'to help him' and 'so they could get this job, be able to build the job.'
>
> "While it is true that Harriett Hannaman's reason for joining the partnership was admittedly to help her husband secure the necessary credits and otherwise meet the government's requirements in connection with the contract, the real question for our decision is whether Harriett Hannaman and the other parties to the agreement actually intended her to be a partner in the business. We are of the opinion that the parties so intended to join together as partners * * *."

The extreme reversal of the Tax Court's approach is clearly shown by *Theodore D. Stern,* 15 T. C. No. 71* where gifts of corporate stock to trusts for minors, followed by liquidation of the corporation and formation of a limited partnership, resulted in a valid partnership. No reference was made to the numerous prior cases to the contrary. *Dissent by Judges Turner, Hill, Harron, Opper and Tietjens was without opinion.* Of significance: Judge Raum (who, as Assistant Attorney General, argued the *Culbertson* case for respondent) apparently voted with the majority, as did the trial judge of the instant case.

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* Acquiescence by the respondent can reasonably be expected in this case since the time to appeal has expired and there has been no announcement of the filing of a petition for review. For comparative purposes, the factual situation in *Stern* is far *less* favorable than either *Tower* or *Lusthaus.*

The passing of time, without authoritative clarification by this Court, will only aggravate an already hopeless confusion of case law.

Respondent's success with the family partnership campaign suggests that a similar campaign could be waged to determine the "tax validity" of marriages. Since 1948, husband and wife, by virtue of their state-law status as such, have a tax advantage—the "income-splitting" provisions of the 1948 Revenue Act*. "Husband" and "wife" are not defined for tax purposes, but neither is "partnership". We knew of no reason consistent with respondent's present views why a general attack, for 1948 and subsequent years, could not be made to determine the "income tax validity" of marriages, no matter when contracted. To think that such a campaign would never be more than a selective one, because a general attack might be politically suicidal, is only to temporize with a dangerous potentiality. From the decisions of this Court, respondent will have fashioned "the ready instrument for political persecution".

Knauer v. *United States,* 328 U. S. 654, at 658.

In *Sam Schnitzer,* 13 T. C. 43, (July 14, 1949; acquiescence, *1950-1 C. B. 4,* affirmed on other issues [9th Cir., 1950] 183 F. (2d) 70) a unanimous Tax Court upholds a family partnership. *Although the partnership had been in business continuously since 1928,* the respondent contended that it was invalid during war years (as the courts below have held here). The same partnership was before the Tax Court as late as September 23, 1946 but respondent raised no issue as to the validity of the partnership (see

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* By §*301 Revenue Act of 1948,* adding §*12(d) Internal Revenue Code,* it is provided that "In the case of a joint return of *husband* and *wife*" the total tax shall be twice the tax on half the net income [Italics ours].

H. J. Wolf, et al., T. C. Memo. Docket No. 6262, 5 T. C. M. 816). Thus, the *Schnitzer* case rejects the contentions of respondent that a partnership can be "invalid for tax purposes" during some of the years of its existence, and valid in others. The contrary was held in these *Anderson* cases (R., 12: "The petitioner and his wife did not *during the taxable years,* intend in good faith to carry on business as a partnership." [italics ours]).

7. The Second Circuit relies on *Morrison* v. *Commissioner,* (October 26, 1949) 177 F. (2d) 351, as sole authority for the result reached in this case (R., 335). In the *Morrison* case, the respondent conceded that the wife rendered services and contributed capital, since he allocated a part of the partnership income to her, for her *services* and her *capital* (see 177 F. (2d) at 352).

The *Morrison* case is directly contrary to this Court's *Culbertson* decision:

> "The question is not whether the services or capital contributed by a partner are of sufficient importance to meet some objective standard supposedly established by the *Tower* case." [337 U. S. at 742]
>
> "The *Tower* case did not purport to authorize the Tax Court to substitute its judgment for that of the parties." [337 U. S. at 745]

Thus, the Second Circuit's decision in the case now before this Court flies in the face of the plain directions of this Court. Its conclusions are "wholly unwarranted on the record" (*Beyer* v. *Le Fevre* [1901] 186 U. S. 114, 119) and "without rational basis" (*United States* v. *Pacific Coast Wholesalers' Association* [1950] 338 U. S. 689).

The *Morrison* case, in sanctioning a reallocation of partnership earnings contrary to the agreement of the parties, squarely conflicts with the Sixth Circuit:

Canfield v. *Commissioner,* (1948) 168 F. (2d) 907, rev'g 7 T. C. 944.

8. Respondent has not questioned the validity of this partnership under Connecticut law.

Connecticut follows the general commercial law of partnerships. In *Silverman* v. *Blodgett,* (1926) 105 Conn. 192, the Court said (p. 214):

> "While we have not as yet adopted the Uniform Partnership Act, our law reaches the same end."

A partner *owns* the income earned by the partnership. In *Filley* v. *Phelps,* (1847), 18 Conn. 294, 300, the Court said:

> "The interest of one partner in the partnership property, is his share in the surplus, remaining after the payment of claims."

Under Connecticut law, a partner who renders services is not ordinarily entitled to compensation.

Balzano v. *Balzano,* (1949) 135 Conn. 584, 592.

The taxability of income derived from property (a federal question) depends upon the ownership of the property; ownership (a state question) follows state law of the ownership of the property. *Commissioner* v. *Wilcox,* (1946) 327 U. S. 404, 408; *Poe* v. *Seaborn,* (1930) 282 U. S. 101; *Blair* v. *Commissioner,* (1937) 300 U. S. 5; *Commissioner* v. *Sunnen,* (1948) 333 U. S. 591.

Petitioner urges that the rule of *Erie R. R.* v. *Tompkins,* (1938) 304 U. S. 64, be applied to federal tax cases to secure uniformity. The vice of the rule of *Swift* v. *Tyson,* (1842) 16 Pet. 1, can be aptly applied to tax cases:

> "For [the commissioner was] given a federal tribunal to secure fair administration of state law, not the administration of independent law." [*Frank-*

furter, Distribution of Judicial Power between United States and State Courts, 13 Cornell L. Q. 499, 529-530 (1928).]

Blair v. *Commissioner, supra,* is consistent with this Court's development of the rule of *Erie R. R.* v. *Tompkins, supra.* See: *Cohen* v. *Beneficial Industrial Loan,* (1949) 377 U. S. 541; *Woods* v. *Interstate Realty Co.,* (1949) 337 U. S. 535.

9. That the Tax Court treated the issue in this case as a species of fraud is shown by its concluding finding of fact:

> "The petitioner and his wife did not, *during the taxable years,* intend *in good faith* to carry on business as a partnership." (R., 12, italics ours.)

The Fifth Circuit has squarely held that respondent's attack on the validity of a partnership is tantamount to a charge of fraud and the clear and convincing evidence rule applies: *Kastel* v. *Commissioner,* (1943) 136 F. (2d) 530, 532,* reversing B. T. A. Memo. *Arnold* v. *Green* and *Ginsberg* v. *Arnold, supra,* are to the same effect.

Later Tax Court cases correctly treat the family-partnership issue as a question of a *fraudulent sham* or an *essential reality.* In *Leo N. Donati,* T. C. Memo, Docket No. 19504, November 24, 1950, 9 T. C. M. 1067 at 1073, the Court said:

> "* * * we find no word of testimony to support respondent's main thesis that the partnership was a sham."

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* "The Commissioner had imposed fraud penalties, which the Board of Tax Appeals did not sustain, but the case clearly presented to the Board an issue of fraud. The elimination of fraud penalties, either in or before the final order, would not have eliminated the fact that the taxpayer was charged with making false returns."

And, in *Earl Rhine,* T. C. Memo, Nov. 28, 1950, Docket No. 18786, 9 T. C. M. 1078 at 1083, the Court said:

> "It was a matter of public record that the business was a partnership and that petitioner, Merti and Mardelle were partners."

10. This case raises an important issue and a recurrent issue in the administration of federal tax laws: the proper scope of review under the amendment to *Section 1141(a) Internal Revenue Code* made by Public Law 773 in effect September 1, 1948 (*infra,* p. 1a). The question was not (and could not have been) considered by this Court in the *Culbertson* case. The *Culbertson* case was decided by the Fifth Circuit on *June 20, 1948* (see 168 F. (2d) 979); hence, neither the Fifth Circuit nor this Court could supply omitted but necessary findings even though support for such findings was in the record under review. Remand was necessary.

See: *Helvering* v. *Rankin,* (1936) 295 U. S. 116, 131. This Court and the Fifth Circuit had to apply the statute as it then existed. *Universal Camera Co.* v. *National Labor Relations Board,* No. 40, February 26, 1951, reversing 179 F. (2) 749.

But, just as the Second Circuit failed to apply the expanded scope of review of National Labor Relations Board proceedings under the *Administrative Procedure Act* and the *Taft-Hartley Act (Universal Camera Co.* case, *supra),* so it has failed to grant to taxpayers the expanded review that Congress intended they should have by the provisions of *Section 1141(a) Internal Revenue Code* as amended.†

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† Actually, in this case the Second Circuit granted a more limited review than it has done either under the Dobson Rule *(Commissioner* v. *National Carbide Co.,* 2nd Cir., 1948, 167 F. (2d) 304, aff'd. 336 U. S. 422 rev'g. 8 T. C. 594) or in cases coming to it from the District Courts (*Orvis* v. *Higgins,* 2nd Cir., 1950, 180 F. (2d) 537, cert. den. October 9, 1950, rev'g. Dist. Ct.).

The Third Circuit's 13-page review in *Ardolina* v. *Commissioner, supra,* sharply contrasts with the one sentence opinion in these Anderson cases (185 F. (2d) 1021). Had proper review been granted, the Court below should have concluded as the *Ardolina* case did:

> "We think that the Tax Court, while paying lip service to the governing law, has failed to recognize that all of the facts reveal a consummated effort which established the wife as a real partner in the concern she helped so much to bring in existence. See *Funai* v. *Commissioner,* 4th Cir., 181 F. (2d) 890, 895." [*Ardolina* v. *Commissioner,* Third Circuit, *supra.*]

11. The failure of the Second Circuit to apply proper statutory standards presents an important question of law, which, because it affects a substantial segment* of the population, should be authoritatively settled. *Great Atlantic & Pacific Tea Company* v. *Supermarket Equipment Corp.,* (December 4, 1950) 340 U. S. 147, 153-154; *Avery* v. *Commissioner,* (1934) 292 U. S. 210; *O'Leary* v. *Brown-Pacific-Maxon, Inc.,* (February 26, 1951, No. 267) 340 U. S. . The conflict in the Circuits is far greater than *Estate of Putnam* v. *Commissioner,* (1945) 324 U. S. 393, in which certiorari was granted.

The conflict revealed by the diverse results reached in the Second and Fourth Circuits in the review of the *same transactions.* (*Wodehouse, supra*), calls for resolution by this Court.

12. The decisions below in the instant case, in failing to apply and follow Connecticut Law and general commercial

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* This court has said that the Second Circuit is "the busiest circuit": *Commissioner* v. *Bedford's Estate,* 325 U. S. 283; lay journals repeat the theme: *"The Top U. S. Commercial Court",* 43 FORTUNE Magazine 92, Jan., 1951.

law, are in direct conflict with the decision in *Johnston* v. *Helvering* (Second Circuit, 1944), 141 F. (2d) 208, certiorari denied 323 U. S. 715, affirming 1 T. C. 228. There the Court below sanctioned the taxation of a New York trust beneficiary's right to share in the proceeds of the foreclosure sale of mortgaged property. A portion of the proceeds is, under state rules of property, allocable to the defaulted interest. (See: *In re Otis,* 276 N. Y. 101; *In re Chapel's Will,* 269 N. Y. 464 for the New York rule.) The rule is generally but not universally adopted: see *Restatement, Trusts,* Section 214.

The Second Circuit said (141 F. (2d) at 210):

> "It is of course true, as taxpayers argue, that the federal fiscal system is self-determined in the sense that the meaning of its terms does not depend upon the law of the state; nevertheless, when Congress imposes taxes based upon the existence of legal rights or duties, it must be understood to refer to such duties as the state law creates, since there are no others; nor could there be, unless Congress were to set up for its fiscal uses systems of municipal law parallel with those existing in the states."

While the *Johnston* case has been criticized* and its soundness questioned†, the result may be correct but is irreconcilable with the result below.

That Congress has specifically consented to subordinate federal law to the state rules of property is clearly indicated

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* "This decision, which creates taxable income out of a deductible loss, properly belongs in a work of magic." *Kennedy, Federal Income Taxation of Estates and Trusts* (1948) p. 97, footnote 4.

† The *Johnston* case was followed in *McCullough* v. *Commissioner* (Second Circuit, 1946), 153 F. (2d) 345, *rev'g.*, 4 T. C. 109, holding taxable the distribution to a trust beneficiary of stock dividends which Congress has declared to be exempt; Judge Frank questioned its soundness.

by the 1942 and 1949 amendments to the *Judicial Code*; formerly, the consent of the United States to be sued in the state or the district courts, was limited to foreclosure actions in which the government had or claimed to have a lien on the mortgaged property (*Judicial Code*, 1940 Ed., *Sections 901, 902, 904, 905*). The 1942 amendment‡ (*56 Stat. 1026, December 2, 1942, c. 656, Sections 1-3*) enlarged the consent to apply to *any* action to *quiet title* to or to foreclose liens on *real or personal property*. See *Judicial Code* (1948), *28 U. S. C. Sections 2410 and 1445* (as amended *May 24, 1949 c. 139, Sections 119 and 82, 63 Stat. 101, 105*, to correct errors in 1948 revision), *infra*, pp. 8a-10a. The statute has been held to be applicable in suits to determine title to property held by husband and wife as partners (*Adler* v. *Nicholas, Collector* (Tenth Circuit, 1948), 166 F. (2d) 674, reversing 70 F. Supp. 514 to permit joinder of United States as a party) or a joint venture of two corporations (*Jones, Collector* v. *Tower Production Co., et al.* (Tenth Circuit, 1943), 138 F. (2d) 675, remanding 45 F. Supp. 593).

Thus, if the respondent should attempt to collect the deficiencies in the *Morrison* case out of the property that was the subject of that dispute, in an action to quiet title thereto, the Second Circuit would be required, by the application of Judicial Code §2410 and *Erie R. R.* v. *Tomp-*

‡ The *Act of December 2, 1942* has only a brief legislative history. Originally introduced as H. R. 3814, 77th Congress, 1st Session, and referred to the Judiciary Committee, it was forwarded to the Attorney General for comment. Amendments were suggested; these were incorporated in H. R. 5578 of the same session, favorably reported on August 15, 1941. House Report No. 1191, contains the letter of Attorney General Jackson of May 7, 1941, approving the bill and suggesting the requirement that the claim of the United States be stated "with particularity". The Senate Report (No. 1646, 77th Cong., 2nd Sess.) is identical with the House Report; passed November 23, 1942, it was approved December 2, 1942, Public Law 780.

kins, to reach a result directly contrary to the decisions now before this Court.

See:

Burnet v. *Harmel,* 287 U. S. 103;
Cohen v. *Beneficial Ind. Loan, supra;*
Reider v. *Thompson,* 339 U. S. 113, 117, rev'g. Second Circuit;
Regents v. *Carroll,* 338 U. S. 586.

13. We submit there is real and embarrassing conflict of opinion and authority not only between the Courts of Appeals but also in the irreconcilable theories of tax law applied by the Second Circuit in other cases. Certiorari should be granted to resolve the conflict.

National Labor Relations Board v. *Pittsburgh Steamship Co.,* No. 42, February 26, 1951.

The questions now presented to this Court are not less pressing than those reviewed in *Wilmette Park District* v. *Campbell,* 338 U. S. 411, 414; *Regents* v. *Carroll,* 338 U. S. 586, *supra,* at 594.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

STATUTES

Internal Revenue Code.

"Sec. 181. Partnership Not Taxable.

"Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity."

"Sec. 182. Tax of Partners.

"In computing the net income of each partner, he shall include, whether or not distribution is made to him——

* * * * * *

"(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183 (b)."

"Sec. 183. Computation of Partnership Income.

"(a) General Rule.—The net income of the partnership shall be computed in the same manner and on the same basis as in the case of an individual, except as provided in subsections (b), (c), and (d)."

"Sec. 1141. Courts of Review.

"(a) Jurisdiction.—The Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in Section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in Section 1254 of Title 28 of the United States Code."

[As amended by Public Law 773, approved June 25, 1948, effective September 1, 1948.]

"Sec. 1112. Burden of Proof in Fraud Cases.

"In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Commissioner."

"Sec. 1118. Provisions of Special Application to Divisions.

"(a) Hearings, Determinations, and Reports.—A division shall hear, and make a determination upon, any proceeding instituted before the Board and any motion in connection therewith, assigned to such division by the chairman, and shall make a report of any such determination which constitutes its final disposition of the proceeding.

"(b) Effect of Action by a Division.—The report of the division shall become the report of the Board within 30 days after such report by the division, unless within such period the chairman has directed that such report shall be reviewed by the Board. Any preliminary action by a division which does not form the basis for the entry of the final decision shall not be subject to review by the Board except in accordance with such rules as the Board may prescribe. The report of a division shall not be a part of the record in any case in which the chairman directs that such report shall be reviewed by the Board."

"Sec. 3797. Definitions.

"(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof——

* * * * * *

"(2) Partnership and Partner.—The term 'partnership' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term 'partner" includes a member in such a syndicate, group, pool, joint venture, or organization."

Revenue Act of 1942

"Sec. 504. Change of Name of Board of Tax Appeals.

"(a) The Tax Court of the United States.—Effective on the day after the date of enactment of this Act, section 1100 (relating to status of Board of Tax Appeals) is amended by inserting at the end thereof the following new sentences: *'The Board shall be known as The Tax Court of the United States and the members thereof shall be known as the presiding judge and the judges of The Tax Court of the United States.'*

"(b) Powers, Tenure, Etc., Unchanged.—The jurisdiction, powers, and duties of The Tax Court of the United States, its divisions and its officers and employees, and their appointment, including the designation of its officers, and the immunities, tenure of office, powers, duties, rights, and privileges of the presiding judge and judges of The Tax Court of the United States shall be the same as by existing law provided in the case of the Board of Tax Appeals. The Commissioner shall continue to be represented by the same counsel in the same manner before the Court as he has heretofore been represented in proceedings before the Board of Tax Appeals and the taxpayer shall continue to be represented in accordance with rules of practice prescribed by the Court. No qualified person shall be denied admission to practice before such Court because of his failure to be a member of any profession or calling.

"(c) References.—All references in any statute (except this section), or in any rule, regulation, or order, to the 'Board of Tax Appeals' or to the 'Board' when used in the sense of 'Board of Tax Appeals', or to the 'member', 'members', or 'chairman' thereof shall be considered to be made to The Tax Court of the United States, the judge, judges, and presiding judge thereof, respectively."

General Statutes of Connecticut

"Chapter 366

"*Property Rights of Husband and Wife*

"PART I.

"*Property Rights of Persons Married on or after April 20, 1877.*

"*Sec. 7307. Not affected by marriage.* In case of marriages on or after April 20, 1877, neither husband nor wife shall acquire by the marriage any right to or interest in any property held by the other before or acquired after such marriage, except as to the share of the survivor in the property as provided by law. The separate earnings of the wife shall be her sole property. She shall have power to make contracts with her husband or with third persons, to convey to her husband or to third persons her real and personal estate and to receive conveyances of real and personal estate from her husband or from third persons as if unmarried. She may bring suit in her own name upon contracts or for torts and she may be sued for a breach of contract or fora tort; and her property, except such as is exempt by law, may be taken on attachment and execution, but shall not be taken for the debts of her husband, except as provided in section 7308. The husband shall not be liable for her debts contracted before marriage, nor upon her contracts made after marriage, except as provided in said section."

§7308 Gen. Stat. Conn., 1949 Revision, so far as material, reads as follows:

"* * * It shall be the duty of the husband to support his family, * * * and the wife shall be entitled to an indemnity from the property of the husband for any property of her own that * * * she shall have been compelled to pay, for the satisfaction of any such claim * * *."

Administrative Procedure Act.

"DEFINITIONS.

"Sec. 2. As used in this Act—

"(a) Agency.—'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the

courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944.

* * * * * *

"(c) Rule and Rule Making.—'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. 'Rule making' means agency process for the formulation, amendment, or repeal of a rule.

"(d) Order and Adjudication.—'Order' means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. 'Adjudication' means agency process for the formulation of an order.

* * * * * *

"(f) Sanction and Relief.—'Sanction' includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a li-

cense; or (7) taking of other compulsory or restrictive action. 'Relief' includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilige, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person.

"(g) Agency Proceeding and Action.—'Agency proceeding' means any agency process as defined in subsections (c), (d), and (e) of this section. 'Agency action' includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."

"PUBLIC INFORMATION.

"Sec. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

"(a) Rules.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published."

"RULE MAKING.

"Sec. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

"(a) Notice.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

"(b) Procedures.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

"(c) Effective Dates.—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule."

"Sanctions and Powers.

"Sec. 9. In the exercise of any power or authority—

"(a) In General.—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law."

"CONSTRUCTION AND EFFECT.

"Sec. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement."

Judicial Code (28 U. S. C.) Section 1444. Foreclosure action against United States.

Any action brought under section 2410 of this title against the United States in any State court may be removed by the United States to the district court of the United States for the district and division in which the action is pending. [June 25, 1948, c. 646, 62 Stat. 938, amended May 24, 1949, c. 139, §82, 63 Stat. 101.]

Judicial Code (28 U. S. C.) Section 2410. Actions affecting property on which United States has lien.

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, including the District Court for the Territory of Alaska, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint shall set forth with particularity the nature of the interest or lien of the United States. *In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions* the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow. [1949 amendment in *italics*]

(c) A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated. A sale to satisfy a lien inferior to one of the United States, shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises.

(d) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If after appropriate investigation, it

appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptroller General who may issue a certificate releasing the property from such lien. [June 25, 1948, c. 646, §1, 62 Stat. 972, amended May 24, 1949, c. 139, §119, 63 Stat. 105.]

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